IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

versus

STATE OF LOUISIANA,
Defendant

Application for Rehearing in Behalf of the State of Louisiana

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To the Honorable Supreme Court of the United States of America:

The State of Louisiana, defendant, presents this petition for a rehearing, and in support thereof, respectfully shows:

I.

The Master's report, which was adopted by this Court, held that the **accretions** to that part of the Louisiana shore from a point on the shore opposite the head of the island, **upstream** for more than a mile to a point on the shore opposite Point "S" (shown on Plates I and II of Louisiana's Original Brief), did not belong to Louisiana. He did not hold that such shore was not Louisiana territory, **but he did hold that the accretions to that shore were not Louisiana territory**. His theory was that when the old channel left after the avulsion,

". . . has proceeded to a point that no water can enter the channel at low stages of the river, which are normal during certain periods of the year, there is then no current in the old channel and the water had become stagnant." (Report p. 10)

The Master then seemed to contend from that premise that because the "thalweg" of the river in the old channel had at some prior time extended upstream from a point in the old channel opposite the head of the island to his Point "S" in the main channel that, therefore, the boundary was frozen from the head of the island as far upstream as Point "S." This holding despite the fact that this Bedford Bar (Louisiana shore) to which the accretions attached, **at all times,** fronted on and was bounded by that portion of the Mississippi River that was upstream from the island. Despite the fact that this shore was not the shore on the old channel around the island, but was the shore to the river upstream from the island. And despite the fact that such portion of the river (upstream from the island) by erosion and accretion changed its course gradually in front of Bedford Bar by alluvial formations, accretion to Bedford Bar, that is, accretions to Louisiana's shore. And despite the fact that Louisiana is entitled to still hold by the same boundary, including the accumulated soil fronting on the river, since the accretions were to her shore.

The legal situation presented with reference to the location of the boundary in that part of the old channel that is **downstream** (as distinguished from the above portion, which is upstream) from the head of the island is entirely different from the legal situation with reference to the location of the boundary in such part of the Mississippi River **upstream** from the head of the island. The law applicable to that part of the

boundary in the old channel which was **downstream** from the island, and which was the abandoned channel, which contained the state boundary is controlled by *Arkansas v. Tennessee*, 246 U. S. 158, 385 S. Ct. 301, which was the exception to the general rule, viz.:

> "An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion;"

Whereas, with reference to the accretions to that portion of the Louisiana shore (Bedford Bar), from a point opposite the head of the island **upstream** to a point opposite Point "S," the general rule is applicable, which we will now briefly point up:

It is admitted by all parties that the land in dispute here was formed by accretions—that such accretions were formed to the right descending bank of the Mississippi River—that the land to which such accretions were formed, from a point on the right or Louisiana shore opposite the furthermost upstream point of the island, on upstream to a point on the shore opposite Point "S," was Louisiana, called "Bedford Bar." These accretions to Louisiana's Bedford Bar have been held here by the Master to belong to Mississippi—wrongly so held, we submit, for the reason that the State of Louisiana, as proprietor of the land fronting on the Mississippi River, is entitled to all of the accretions to her shore. This point has nothing to do and is not relative to any question of avulsion, for the old channel left by the avulsion only commences at the head of the island, and what we are now talking of is upstream from such point. And even if the thalweg which entered into the old channel did at one time extend on upstream

from the head of the island in the channel to Point "S," nevertheless, such was still in the stream which bounded Bedford Bar, and the accretions were to Bedford Bar in this same stream. This principle that accretions belong to the front proprietor was decided by this Court in *New Orleans v. United States*, 10 Peters 661, 9 L. Ed. 573, viz.:

> "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.
>
> "This rule is no less just when applied to public, than to private rights. The case under consideration will illustrate the principal."

Also, in *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396, viz.:

> "It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as 'accretion', the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary."

And the same case held that in such respect there was no difference in the rule between private individuals and states, viz.:

> "These propositions, which are universally recognized as correct where the boundaries of private property touch

on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel."

This Court likewise in *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, decreed that even in the case of an avulsion, which was the exception to the general rule, the boundary in the old channel was still subject to be changed by erosion and accretion. Thus, this last case did no more than follow, in this respect, the same general rule fixed in *New Orleans v. United States*, supra, viz.:

". . . the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil."

This Court said in such *New Orleans v. United States*, supra, and was quoted and followed in *Missouri v. Nebraska*, 196 U. S. 23, 25 S. Ct. 155, viz.:

" 'No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.' It was added—what is pertinent to the present case—that 'this rule is no less just when applied to public than to private rights.' "

Plate II of Louisiana's original brief was the very premise used by the Master in fixing the boundary suggested by him. By view of this Plate II it can be seen that the part of the Louisiana shore, opposite the head of the island on up-

stream to a point on the shore opposite Point "S," is unquestionably the shore to which the accretions were added, which are here in dispute. That portion of the Louisiana shore (which is upstream from the island) (Bedford Bar) is entitled to that which was added by accretion, and what was added by accretion to this shore is what Louisiana here contends for, that is, the accretions to the Louisiana shore **upstream** from the head of the island.

If the Court will but refer to any (see Louisiana Exhibit No. 43, R 1398) of the numerous Mississippi River Commission Charts since 1878-1880 (Plate I of Louisiana's brief) it will see that the accretions were to the Louisiana shore upstream from the head of the island. Even the present-day charts clearly so show.

Accordingly, we submit that which we contended for in our original brief (page 13 et seq.) that the accretions to the Louisiana shore (Bedford Bar) upstream from the head of the island belong to Louisiana. This Bedford Bar fronted on a stream and accretions were formed to the Bar. Under the above jurisprudence such accretions can only belong to Louisiana.

II.

We have hereinabove spoken of the accretions to the Louisiana shore **upstream** from the head of the island. Now, for another reason why the Master's opinion is erroneous: The reasons given by the Master for freezing the boundary in the old channel **downstream** from the head of the island run counter to *Arkansas v. Tennessee*, supra. The Master said, viz.:

> "When . . . no water can enter the channel at low stages of the river, which are normal during certain periods of

the year, there is then no current in the old channel and the water has become stagnant." (Report 10)

This Court in *Arkansas v. Tennessee*, supra, **in its decree**, which is opposed to the Master's holding, fixed the boundary, viz.:

"Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

". . . . .

"(3) The boundary here should now be located according to the middle of that channel **as it was at the time the current ceased to flow therein as a result of the avulsion** of 1876.

". . . .

"(5) **The nature and extent of the erosion and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876,** and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, ..."

Arkansas v. Tennecssee, supra, under its decree above quoted, did not make any distinction between erosion and accretion at low water and erosion and accretion at other stages of the river. But the Master did, and we submit that his decision is in conflict with *Arkansas v. Tennessee*, supra.

We submit, then, that the erosion and accretion in this old channel **downstream** from the head of the island should not be stopped at some speculative place, but that there was

erosion and accretion that actually took place and moved the channel to its present position when the current last ceased to flow therein. The present location thereof is approximately as shown on the Mississippi River Commission survey of 1878-80 (See Plate I of Louisiana's original brief). Certainly, it was the accretion to Bedford Bar which caused this old channel to meander to the position shown on such Plate I. And the old channel is on the ground today and it shows "the nature and extent of the erosion and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion." *Arkansas v. Tennessee*, supra.

Finally, as to this old channel, we submit that it only came to be in the position as shown on the 1878-80 survey (Plate I of Louisiana's original brief) as a result of previous erosion and accretions. How else could it have gotten there? The channel as shown on this survey is approximately the same old channel surveyed on the ground today.

III.

The Special Master at no time attempted to meet the impact of the heavily settled jurisprudence of this Court that, as to the accretions, **upstream** from the head of the island to the Louisiana shore (Bedford Bar) that such accretions by adding to the Louisiana shore which fronted on the Mississippi River, necessarily became the property of Louisiana. We have discussed this under Part I hereof. Under this argument, it does not matter when the current ceased to flow in the old channel, for this part of the Louisiana shore did not front on the old channel around the island, it fronted on the main channel upstream from the head of the island.

However, as to the boundary downstream from the head of the island, the reasoning of the Master was that when the current first ceased to flow in this old channel at **some seasonal low water stages,** why the accretions thereafterwards to the Louisiana shore along such part of the river, did not belong to the land to which they formed. We have discussed this under Part II hereof.

Next, the Master contended that when the old channel could not be navigated **at some seasonal low water stage,** why, as he said, this old channel "no longer has a thalweg." The short answer to this claim of the Master is found in the cases decided by this Court, such as *Economy Light and Power Company v. United States*, 256 U. S. 113, 41 S. Ct. 409, from which we quote, viz.:

> "The Circuit Court of Appeals, in passing upon the question of navigability correctly applied the test laid down by this court in the Daniel Ball, 10 Wall. 557,563, 19 L. Ed. 999, and The Montello, 20 Wall. 430, 440-443, 22 L. Ed. 391; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; **nor need the navigation be open at all seasons of the year, or at all stages of the water."**

Corpus Juris Secundum, Vol. 65, Navigable Waters, Sec. 6(c), page 56, says:

"A stream, in order to be constituted a navigable stream,

need not be perennially so but may be floatable only at certain seasons."

The case of *United States v. Utah*, 283 U. S. 64, S. Ct. 438, held certain rivers in Utah were navigable even though at some seasons of each year the water in such rivers was so low that they could not be navigated.

We submit that the Master's reasoning is erroneous when he said that this old channel "no longer had a thalweg" when at a seasonal low water the old channel could not be navigated. Even though the thalweg (or state boundary) in this old channel did become fixed at some seasonal low water, the thalweg became live and active in the remaining seasons of the year when the channel was a running stream capable of being navigated. We submit that seasonal changes as existed up to 1878-80 did not cause this old channel to cease forever to become navigable at the first seasonal low water stage, when at other seasons of the year it was navigable in fact. This old channel only came to be in the position shown on Chart I of Louisiana's original brief as a result of current flowing therein causing erosion to one side and accretion to the other.

IV.

The question of boundaries between the states bordering on the Mississippi River, as well as other rivers in alluvial plains, is a continuing and ever present one. Of much importance to the states, too. There have been numerous disputes settled between the states under and by authority of the cases here relied on by the State of Louisiana. Many lower courts, both state and federal, have followed these cases, especially *Arkansas v. Tennessee*, supra. Now, this Court, Louisiana con-

tends, has adopted a Master's report which certainly deviates from and conflicts with the jurisprudence fixed by this Court. This Court has not seen fit to adjudicate the contentions of the sovereign State of Louisiana. Fact and reasoning, we contend, have not been given in the form of an opinion by this Court in answer to Louisiana's contentions. We believe she was and is entitled to an opinion, wherein reasons are set forth as to why her contentions are right or wrong.

The framers of our constitution and the lawmakers believed the problem of differences between states was such a high and important matter that they gave this Court exclusive original jurisdiction thereof. The only other category which this Court has exclusive original jurisdiction over is with reference to ambassadors of other nations. As Mr. Justice Douglas, as organ of this Court in *Georgia v. Pennsylvania Railroad*, 324 U. S 439, 65 S. Ct. 716, said, viz.:

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between states and between a state and citizens of another state . . . . . **The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war.** Suit in this Court was provided as an alternative."

Again, the late great Mr. Justice Holmes, as organ of this Court in *Virginia v. West Virginia*, 220 U. S. 1, 31 S. Ct. 330, stated, viz.:

> "The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust

differences that cannot be dealt with by Congress or disposed of by the Legislature of either state alone.

"As this is no ordinary commercial suit, but, as we have said, **a quasi international difference,** referred to this Court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies, we think it best at this stage to go no further, but to await the effect of a conference between the parties, which, whatever the outcome must take place. . . . Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the union, and mutual consideration to bring it to an end."

Finally, this Court said in the early case of *Rhode Island v. Massachusetts*, 9 L. Ed. 1233, in speaking of boundary disputes between states, that prior to the adoption of the Constitution, each state had a right to settle its boundary dispute with another state **by a treaty, or failing treaty, by war.** The constitution barred both methods and provided that the boundary could be settled by agreement, if approved by Congress, or else by judicial authority. The agreement of the states to submit their boundary disputes to judicial authority was believed to be of such a high order, dealing with the sovereignty of the states, that original jurisdiction of the highest court of the land was fixed. By statute this jurisdiction was fixed exclusively in this court.

Furthermore, from our research of the matter, this case is the first case between two sovereign states wherein this Court has not handed down an opinion in which the contentions of the states were answered.

Accordingly, the State of Louisiana requests that, in the event a rehearing is not granted herein, that an opinion of this Court be handed down in which Louisiana's contentions that the Master's opinion is in conflict with other entrenched jurisprudence of this Court, are answered.

CONCLUSION

It is submitted that the fundamental principle that a person or state, whose land is bounded by a stream of water, which changes its course gradually by alluvial formations (accretions), shall still hold by the same boundary, including the accumulated soil. Such was applied by *Arkansas v. Tennessee* even to the old channel in case of an avulsion. This Court by adopting the Master's report has held differently from such fundamental principle.

It is further submitted that the seasonal low waters which prevented navigation during such season of low water in this old channel did not cause the old channel to immediately cease to be navigable where it was navigable in fact during all of the other seasons of the year, nor did such seasonal low waters cause the channel to cease to be a running stream.

Rehearing should be granted and all of Louisiana's exceptions maintained.

Respectfully submitted,

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CERTIFICATE

This is to certify that this application for a rehearing in behalf of the State of Louisiana is presented in good faith and not for delay; and that copies of the foregoing petition for rehearing have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, November ____, 1955.

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